Supreme Court of the United States

OCTOBER TERM—1923.

No. 447.

17

UNITED STATES OF AMERICA,
Appellant (Defendant),

against

SUPPLEE-BIDDLE HARDWARE COMPANY,
Respondent (Plaintiff).

APPEAL FROM THE COURT OF CLAIMS

BRIEF AND PETITION
With Notice of Motion for Leave to File Brief as Amici Curiae

HENRY NECARSULMER,
MAX J. KOHLER,
Of Counsel,
as *Amici Curiae*.

ANALYTICAL INDEX.

CASES CITED.

STATUTES, REGULATIONS AND MISCELLANEOUS BOOKS.

Supreme Court of the United States

OCTOBER TERM—1923.

No. 447.

UNITED STATES OF AMERICA,
Appellant (Defendant),

against

SUPPLEE-BIDDLE HARDWARE COMPANY,
Respondent (Plaintiff).

Notice of Motion for Leave to File a Brief as Amici Curiae.

You will please take notice that the undersigned, acting as counsel for Bernhard Ulmann Co., Inc., a New York corporation, interested as a claimant for refund of taxes in the questions involved in the above entitled suit, will ask leave of the Court at the opening of the Court on Monday, April 7, 1924, or as soon thereafter as counsel can be heard, to file a brief as *amici curiae* and for such other or further relief as may be proper.

New York, April 1, 1924.

HENRY NECARSULMER,
MAX J. KOHLER,
Of Counsel.

To

Hon. James M. Beck,
Solicitor General,
Department of Justice,
Washington, D. C.

Alfred A. Wheat, Esq.,
Special Assistant to the Attorney General.

Hon. A. Mitchell Palmer,
Counsel for Plaintiff (Respondent).

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1923.

No. 447.

UNITED STATES OF AMERICA,
Appellant (Defendant),

ainst

SUPPLEE-BIDDLE HARDWARE COMPANY,
Respondent (Plaintiff).

Petition for Leave to File Brief as Amici Curiae.

The undersigned respectfully petition this Honorable Court for leave to file accompanying brief as *amici curiae* in the above entitled suit.

You petitioners apply as counsel for the Bernhard Ulmann Co., Inc., a New York corporation, which has filed a claim for refund of $43,178.71 income and excess profits taxes assessed against said corporation under the Revenue Act of 1918 on the proceeds of two ordinary life insurance policies of $50,000.00 each, covering the life of its president and payable to the corporation.

The issues presented in the above mentioned suit include the determination of the constitutionality of the Revenue Act of 1918 in so far as it purports to impose an income tax on the proceeds of life insurance policies payable to a corporation, on the life of one of its officers.

The issues presented in said claim for refund are practically the same as in the above entitled suit.

The claim of your petitioners' client would therefore be necessarily determined by the deci-

sion of the questions involved in the above entitled suit, and counsel understand that the Internal Revenue Bureau is delaying determination of said claim pending the determination of this appeal.

The questions involved are of considerable general importance.

Notice of this application and a copy of the brief of your petitioners have been served upon the counsel for the respective parties in the above entitled suit.

All of which is respectfully submitted for the consideration and action of the Court.

New York, N. Y., April 1, 1924.

HENRY NECARSULMER,
MAX J. KOHLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1923.

No. 447.

UNITED STATES OF AMERICA,
Appellant (Defendant),

against

SUPPLEE-BIDDLE HARDWARE COMPANY,
Respondent (Plaintiff).

BRIEF IN SUPPORT OF RESPONDENT.

This is an appeal from a judgment of the Court of Claims in favor of plaintiff in the sum of $55,138.89, representing income and excess profits taxes assessed against plaintiff on "term" life insurance policies payable to and collected by plaintiff, in the sum of $97,947.28 upon the life of its deceased president and managing head, Robert Biddle, 2nd, which policies were taken out in April, 1917, payable to plaintiff and on which it paid the premiums. Mr. Biddle was the soul and dominating head of plaintiff corporation, and his death inflicts a loss upon it far in excess of the proceeds of the policies involved. Mr. Biddle died of influenza in October, 1918, and the tax was assessed by the Internal Revenue officials under the alleged authority of Sections 213, 230 and 233 of the Revenue Act of 1918, adopted February 24th, 1919 (40 Stat., 1057), as construed by the Commissioner of Internal Revenue and plaintiff paid the tax under protest, and then instituted this suit for its refund. The Court of Claims unanimously sustained plaintiff's contention and the Government has appealed.

POINT I.

The proceeds of life insurance policies payable at the death of the insured, whether payable to corporations or individual beneficiaries, are not "income" under the Federal Constitution, and Federal statutes ought to be construed to avoid such serious constitutional question as arises from wresting the term "income" from its ordinary meaning.

(a) This Court, in the case of

> *Eisner* v. *Macomber*, 252 U. S., 189, at 205-7,

laid down a definition of the term "income" and tests which, it is submitted, require an affirmance of the decision below in favor of the taxpayer. Speaking by Mr. Justice Pitney, it said:

> "The Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished: 'The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment, among the several States and without regard to any census or enumeration.' As repeatedly held, *this did not extend the taxing power to new subjects*, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. Brushaber *v.* Union Pacific R. R. Co., 240 U. S., 1, 17-19; Stanton *v.* Baltic Mining Co., 240 U. S., 103, 112, *et seq.;* Peck & Co. *v.* Lowe, 247 U. S., 165, 172-173. A proper regard for its genesis, as well as its very clear language, requires also that this Amendment *shall not be extended by loose construction*, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon

property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts. In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, *it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form.* Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised. *The fundamental relation of capital to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term 'income,' as used in common speech, in order to determine its meaning in the Amendment;* and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue. After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert*, 231 U. S., 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 185)—*'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets,* to which it was

applied in the Doyle case (pp. 183, 185). Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' *which was extended to include a variety of meanings: while the significance of the next three words was either overlooked or misconceived. 'Derived - from - capital:'—the 'gain - derived-from-capital,' etc.* Here we have the essential matter; not a gain accruing to capital, not a growth or increment of value in the investment; *but a gain, a profit, something of exchangeable value proceeding from the property,* severed from the capital, however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal;—that is income derived from property. Nothing else answers the description."

(b) In the present case, we have no express statute, attempting directly to tax such insurance, when payable to a corporation, but, at most a mere alleged inference, arising from an exemption of such policies when payable to individuals, under the Act of February 24, 1919 (40 Stat., 1057 at 1065 and 1077, Sections 213 and 233 (a) respectively). The case is, therefore, much more like *Towne* v. *Eisner*, 245 U. S., 418, than *Eisner* v. *Macomber*, *supra*, in which latter case the Court was compelled squarely to decide the constitutional question as to stock dividends, accruing and paid, subsequent to the 16th Constitutional Amendment. Here, therefore, we are directly within the rule of

U. S. v. *Delaware & Hudson Co.*, 213 U. S., 366, 408;
U. S. v. *Jin Fuey Moy*, 245 U. S., 394, 401.

Matter of International Railway Co., 226 N. Y., 474, 482, holding that *a statute should be construed, if possible to avoid reaching a result of doubtful constitutionality.* As said concisely by Mr. Justice Holmes, speaking for the Court in the *Jin Fuey Moy* case:

> *"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."*

The leading points of inquiry under such a statute are thus indicated in *Eisner* v. *Macomber, supra*, as:

(1) Was such insurance regarded as "income" at the time of the enactment of the 16th Amendment, it being settled that the Amendment was not designed to extend the taxing power to new subjects.

(2) In answering the inquiry, regard is to be had of the difference between "capital" and "income" in the ordinary acceptation of the terms, and that the latter must "*proceed*" from the former. In that connection, the language of the Court in *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 185, is very much in point:

> "Whatever difficulty there may be about a precise and scientific definition of 'income,' *it imports, as used here, something entirely abstract from principal or capital,* either as a subject of taxation or as a measure of the tax; *conveying* rather the idea of *gain or increase arising from corporate activities.* As was said in *Stratton's Independence* v. *Howbert*, 231 U. S., 399, 415, 'Income may be defined as the gain derived from capital, from labor, or from both combined. * * * *In order to determine whether there has been gain or loss and the amount of the gain, if any, we must with-*

> *draw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.'"*

(3) *Income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets.*

(c) Though it is proposed to consider more fully, under Point II, the construction of the paragraphs of the Income Tax Law of 1918 (adopted February 24, 1919), here involved, it will be convenient to quote the sections in question at this point, bearing in mind the fact that no prior statute or judicial decision before 1914 lends color to the claim, that the proceeds of a life insurance policy are "income," as also the fact that the elimination after "paid" of the words "individual beneficiaries or to the estate of the insured," expressly led to the abandonment of the Government's contention that life insurance policies payable upon death to corporations are income under the present Act, enacted in 1921, Sec. 213(b) (Regulations 62, Article 541, 1922).

The Revenue Act of 1918 (40 Stat., 1057, *et seq.*), devotes its Title I to "General Definitions" and Title II to "Income Tax,"—Part II thereof (Sections 210, *et seq.*, p. 1062, *et seq.*), dealing with the tax on individuals, and Part III (Sec. 230, *et seq.*, p. 1075, *et seq.*), dealing with the tax on corporations. In the section dealing with the tax on individuals, we read (p. 1065):

> "Sec. 213: That for the purpose of this title (except as otherwise provided in section 233) the term 'gross income'
>
> (a) includes gains, profits and income derived from salaries, wages and compensation

for personal service * * * *or gains or profits and income derived from any source whatever*, but

(b) Does not include the following items, which shall be exempt from taxation under this title:

(1) *The proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured;*

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract;

(3) The value of property acquired by gift, bequest, devise or descent (*but the income from such property shall be included in gross income*);"

In the part of this Title dealing with the Income Tax on corporations, which begins with Section 230 (p. 1075), we find, at page 1077:

"Sec. 233: That in the case of a corporation subject to the tax imposed by section 230, the term *'gross income' means the income as defined in section 213*, except that

(1) in the case of life insurance companies, there shall not be included in gross income such portion of any actual premium received from any individual policy-holder, etc. (provisions follow as to mutual marine insurance corporations, and foreign corporations)."

As regards Section 213, dealing with individuals, it will be observed, that all life insurance policies payable on the death of the insured are expressly excepted from income, barring only, possibly, policies payable to a partnership, but

such entity was expressly exempt as such from income tax under Section 218, and the Commissioner of Internal Revenue ruled that life insurance payable to it was exempt (Digest of Income Tax Rulings No. 19, April, 1919—Dec., 1921, p. 131, under Sec. 213 b., Art. 72).

Section 233 applied the same definition to corporate income as was applicable to individuals, with exceptions thereinafter expressly enumerated; and as will be further argued hereafter, it is unreasonable to suppose that a nominal limitation applicable only to individuals was *thereby* intended to be applied to corporations in a phrase adopting the former definition to the latter, and such contention is "over-literalness," and straining at the letter. The important matter to be considered is,—as pointed out hereinafter, in quoting from an able opinion by Attorney General Gregory (31 Opinions, 304), dealing with Accident Insurance under the Income Tax Laws,—that it is necessary to bring the same under the phrase

> "gains or profits and income derived from any source whatever"

to make the insurance policy proceeds here involved, taxable, as against corporations.

As further evidence that *capital*, rather than *income*, is here involved, we note:

> "Sec. 215 (p. 1069): That in *computing* net income, *no deduction shall be allowed in respect of* * * *
>
> (d) *Premiums paid on any life insurance policy covering the life of any officer* or employee or of any person *financially interested in any trade or business carried on by the taxpayer* when the taxpayer is directly or indirectly a beneficiary under such policy"

a provision evidently based on the theory that dis-

bursements incurred in connection with non-taxable items, are not to be deducted from income, and evidently intended to be applicable to corporations, too, as witness the term "officer."

(d) *The question whether life insurance is "income" was squarely raised under our Civil War Income Tax Laws, and directly answered in the negative by our administrative authorities, and such determination, uniformly followed until after the 16th Amendment was adopted, is entitled to much weight.*

On April 23rd, 1866, the Deputy Commissioner of Internal Revenue, under the Income Tax Laws then in force (Act June 30, 1864, 13 Stat., 281, *et seq.*, as amended March 3, 1865, 13 Stat., 469, and March 10, 1866, 14 Stat., 4-5),—which used the same phrase as the recent Acts above quoted as to "gains, profits or income from any other source whatever" (but without any specific reference to life insurance policies)—ruled:

> "To your inquiry of the 16th instant 'Is a sum received by A from a life insurance company upon a policy taken out by B for the benefit of A, taxable in any form under the excise tax?' I reply that by the rulings of this office, *sums of money paid by insurance companies are subject to neither legacy nor income tax.*" (3 Internal Revenue Record, 140.)

Similarly in Instructions to U. S. Assessors under date of Jan. 1, 1868, the U. S. Commissioner of Internal Revenue, under similar acts, in dealing with the deductions of premiums on insurance, wrote:

> "20°. So far as insurance monies are paid as an expense of business they are deductible from income, but *no insurance on homestead of taxpayer, nor on his life or other lives*, nor

on his rented property (if paid by tenant) *can be allowed*. Insurance paid by tenant is deductible from tenant's income as rent paid." (7 Internal Revenue Record, 59.)

Both of these rulings are summarized in Bump's "Internal Revenue Laws" (1870 ed., pp. 287, 294), and they seem to be the only recorded American rulings, pro or con, antedating the adoption of the 16th Amendment. In line with these rulings, reference is in order, on the question as to what was understood to be taxable income, to the decision in

Gray v. *Darlington*, 15 Wallace, 63 (1872),

holding that a profit realized on the sale of bonds is not taxable under the Income Tax Law, even though its authority as to taxability of the proceeds of sale or conversion of capital assets is shaken by recent cases.

It is significant, that no attempt was made to treat the proceeds of life insurance, either in statutes or rulings, as "income" until some time after the 16th Amendment was adopted, while, on the other hand, as we will presently see, such proceeds have been treated as capital, to be taxed under Inheritance Tax Laws, or declared exempt even from such acts, on grounds of public policy or long usage. The Income Tax Law of 1913 (38 Stat., 166 at 167, Sec. 2 B), while assessing a tax on various kinds of income, including finally

> "gains or profits and income derived from any source whatever, *including the income from, but not the value of property acquired by gift, bequest, devise or descent*" (continued)
>
> "Provided, that *the proceeds of life insurance policies paid upon the death of the person insured*, or payments by or credited to the insured, on life insurance endowments or annuity contracts upon the return thereof to the

> insured, at the maturity of the term mentioned in the contract, or upon the surrender of contract, *shall not be included as income*."

Under this Act, the Regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, dated Jan. 5th, 1914, treated all "proceeds of life insurance policies paid upon the death of the persons insured to beneficiaries" as excludable from gross income (Regulations No. 33, Articles 5; 96 *et seq.*).

It will be observed that the alleged words of limitation "paid * * * to individual beneficiaries or to the estate of the insured" are not present there. On the other hand, *on the doctrine of associated words*, it is obvious that the *association of "life insurance" with property acquired by gift, bequest, devise or descent—in terms made not taxable itself, though the income therefrom was rendered taxable*—indicates the underlying idea in the draftsman, that capital was in each case involved, only the income from which was to be taxable, and this association of thought is carried through all the various Income Tax Laws.

> *Gegiow* v. *Uhl*, 239 U. S., 3, 10;
> *U. S.* v. *Baumgartner*, 259 F., 722, 724-5;
> *Howe* v. *U. S.*, 247 F., 292, 294 C. C. A.;
> 36 *Cyc.*, 1118.

The Act of 1916 (39 Stat., 756-758), defined income as above, and in Sec. 4 enacted the exemption of life insurance policies from "income" in a paragraph dealing with individual incomes, but did not in terms include a definition of corporate income, similar to that in the later Act of 1918, quoted. On the other hand, the Act of October 3, 1917 (40 Stat., 300-38), in Sec. 504, in terms imposed a tax of eight cents per $100, on every life

insurance policy issued, and in Sec. 1211 (40 Stat., 338), amended Sec. 32 of the Act of 1916, by providing

> "that premiums paid on life insurance policies covering the lives of officers, employees or those financially interested in any trade or business conducted by an individual, partnership, *corporation* * * * shall not be deducted in computing the net income of such individual, corporation * * * or in computing the profits of such partnership for the purpose of subdivision (e) of section 9,"

again clearly evidencing the theory that exempt assets under the Income Tax Law were involved, disbursements in connection with which should not be deductible from gross income. This view was strengthened by a new section in the Revenue Law of 1918, here directly involved (40 Stat., pp. 1097-8) (obviously treating such policies as capital), making life insurance policies payable at death, taxable under the "Estates Tax," as follows: those payable to decedent's estate absolutely, and those to other beneficiaries for the excess over $40,000, reading:

> "Sec. 402: * * * That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *
>
> (b) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount received by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Under the Acts of 1916 and 1917, at a time when the Government was still declining to acquiesce in the ruling as to stock dividends rendered by

this Court under the Act of 1913 in *Towne* v. *Eisner*, 245 U. S., 418, as applied to the constitutional question relative to stock dividends, earned and declared after the 16th Amendment was adopted (31 Opinions, 213), Attorney General Gregory rendered a very able opinion as to the *non-taxability of the proceeds of accident insurance policies* under the Income Tax Laws of 1916 and 1917, which is very much in point here, reported as

31 Opinions Attys. General, 304.

Almost all of his reasoning applies also to life insurance policies payable to corporations, there having been no specific provision in the acts in question as to accident insurance; and nearly all his arguments meet points relied on herein by the Government. Mr. Gregory said:

> "2. *It is evident that if the proceeds of an accident insurance policy are to be brought within the provisions of the act of September 8, 1916, as amended, it must be under the general words of subdivision (a) of Section 2, supra: 'gains or profits and income derived from any source whatever.'* "

After quoting from *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179; *Lynch* v. *Hornby*, 247 U. S., 339; *Lynch* v. *Turrish*, 247 U. S., 221 *and Southern Pacific Co.* v. *Lowe*, 247 U. S., 330 he continued:

> "Are the proceeds of an accident insurance policy 'gains or profits and income' according to the principles thus laid down by the Supreme Court? *The proceeds of life insurance policies are expressly exempted from the act by section 4; nor does the fact that the section refers to them as 'income' seem significant. 'The value of property acquired by gift, bequests, devise, or descent' is treated in the same way, and yet the 'income' from such property is included. This seems to imply that*

the property itself is capital. As to fire, marine, and casualty insurance, paragraph (a) of section five impliedly prohibits the deduction of losses when compensated for by such insurance. Upon this point the Court of Appeals for the Sixth Circuit in *Doyle* v. *Mitchell Brothers Company* (235 Fed., 686, 688), in illustrating the principles subsequently declared to be sound by the Supreme Court in the same case, said:

"'* * If an illustration were needed to show that money received from selling capital assets cannot be "income," it would be found in *the statutory treatment of insurance money. A loss suffered during the year may be deducted from income, but not so if the loss was compensated by insurance.* Fire insurance money is clearly a substitute for the assets burned; but we find that in case of a fire loss uninsured, the loss may be deducted from income, while if it is insured, and if the insurance money is "income," the loss may not be deducted, and the insurance money must be added—*an absurdity which can be avoided only by saying that such insurance money is not income at all.* The proceeds of the sale of a building or other permanent assets are as clearly a substitute therefor as is the insurance money paid to indemnify for a building burned.'

"Assuming that this dictum is a correct construction of the act, and is not directly applicable to accident insurance as included in casualty insurance, it follows that *if the proceeds of such accident insurance are held to be 'income,' they are in a category different from the proceeds of any other kind of insurance.* In my opinion the act does not make such a distinction, because *the proceeds of an accident insurance policy are not 'gains or profits and income' as these terms are defined by the Supreme Court. Without affirming that the human body is in a technical sense the 'capital' invested in an accident policy, in a broad, natural sense the proceeds of the policy do*

but substitute, so far as they go, capital which is the source of future periodical income. They merely take the place of capital in human ability which was destroyed by the accident. They are therefore 'capital' as distinguished from 'income' receipts."

It will be observed from the above that the Attorney-General properly considered as having no real significance, the circumstances that the Act, in exempting such receipts, itself describes it as "income," and he makes the point hereinbefore suggested as here applicable, that *insurance* is analogous to "*property acquired by gift, bequest, devise, or descent,*" which the statute treats as capital, making the *income therefrom* merely taxable. His further point, here applicable, is also sound, that "insurance" on life (whether accident or life insurance) is not income, but a "*substitute*" for the "human body, taking the place of capital in human ability which was destroyed."

(c) *In fact, policies of life insurance paid upon the death of insured persons have constantly been treated by the courts as in the nature of capital, taxable under inheritance tax laws, even without specific references to such insurance in the statutes, unless—as occasionally occurs—they are regarded, on grounds of public policy or long usage, as entirely exempt from taxation, in the absence of specific provisions for their taxability.*

> *3 Internal Revenue Record,* 140 (1866; above quoted);
>
> *Tyler* v. *Treasurer,* 226 Mass., 306 (see *post.*);
>
> *Matter of Knoedler,* 140 N. Y., 377;
>
> *Matter of Voorhees,* 200 App. Div., 259;
>
> *Matter of Parsons,* 117 App. Div., 321;

> *In re Bullen's Estate*, 143 Wis., 512, 523 (affirmed on other points in 240 U. S., 625);
> *Matter of Allis*, 174 Wisc., 527;
> *Gaither* v. *Miles*, 268 Fed. R., 692.

The fact that a corporation is the beneficiary is immaterial, because even a gift to a corporation has been sustained as not of the character of income, though, of course life insurance is not a gift where the corporation beneficiary pays the premiums.

> *U. S.* v. *Oregon Washington R. & N. Co.*, 251 F., 211 (C. C. A.).

(f) *Some leading cases, dealing with the nature of life insurance policies, have gone even further than did Attorney General Gregory in the opinion cited, in describing them as in the nature of indemnity, especially when taken out in favor of a corporation, at its expense, on the life of an officer, and not merely as "substitute for human life."* The purpose is, of course, in the nature of compensation for loss, and depends upon death, and is not profit, yielded merely by a succession of premiums, regardless of the life involved. Only persons having an insurable interest can take out such insurance, and statutes regulate rates, reserves, conditions, etc. based upon average duration and probability of life, all tending to minimize the wagering element, so that the insurance companies, on the average, make a slight profit on each policy, and not the insured or the person paying the premiums. Commonly, as in "term insurance" which is directly involved here, and very largely in the case of "ordinary life," practically no return is received at all, if the policy is permitted to lapse before its maturity. Everything involved indicates that

language is stretched from the ordinary meaning, in regarding the proceeds of a life insurance policy as "income," yielded on the "premiums," regarded as capital. Said this Court in

> *Washington Central Bank* v. *Hume*, 128 U. S., 195:

> "*Marine and fire insurance is considered as strictly an indemnity*, but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, *nevertheless the contract is also a contract of indemnity*."

In the case in question, where an insolvent debtor paid premiums on the insurance policies involved, payable to his wife and children, though without fraudulent intent, this Court reversed the holding below, giving to creditors the premiums involved, saying:

> "The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground.'

Life insurance policies payable to corporations in which the insured is active, and on which they pay the premiums, have been sustained, as far as an insurable interest is involved, but special facts must be shown, to establish the compensatory character of such agreements, so that here in particular, approximate "indemnity" roughly speaking, is involved, and not "gain or income" on the basis merely of investment of premiums.

In the recent case of *United Security Life Ins. & Trust Co.* v. *Brown*, 113 Atlantic, 446; 270 Pa. State, 270, the Court said;

"The question of the insurable interest of the employer in the life of the employee, or of the corporation in its officers, though not the subject of discussion in Pennsylvania, has been considered in other jurisdictions, where it is held that *there is no implied interest in the life of such person justifying the issuance of a policy for the benefit of the employer.* Victor v. Louisa Cotton Mills, 174 N. C., 107; 16 L. R. A., N. S., 1020; 16 Ann. Cases, 291 Cf. Tate v. Commercial Bldg. Ass., 97 Va., 74; 45 L. R. A., 243; 75 Am. St. Rep., 770. *To sustain a contract of this character, it must further appear that there is a real concern in the life of the party named, whose death would be the cause of substantial loss to those who are named as beneficiaries. This does not follow the cessation of ordinary service, but arises where the success of the business is dependent on the continued life of the employee. In such case the insurance contract will be upheld.* Mutual Life Ins. Co. of N. Y. v. Board Armstrong & Co., 115 Va. 836; L. R. A., 1915, F. 979; Keckley v. Coshocton G. Co., 86 Ohio St., 213; Ann. Cases, 1913, D. 607; Mechanics Natl. Bank v. Comms., 72 N. H., 12; 101 Am. St. Rep., 650."

In Burlingham v. Crouse, 228 U. S., 459, the Court, in holding that a bankrupt assured has the right to retain life insurance policies, subject only to the duty, where the policy has a surrender value, to pay the surrender value over to the Trustee in Bankruptcy, recognized the anomalous character of life insurance as property, even under the Bankruptcy Law, and said:

"*While life insurance is property, it is peculiar property.* Legislatures of some of the States have provided that policies of insurance shall be exempt from liability for debt, and in many States provision is made for the protection from such liability of policies in favor of those dependent upon the insured. (See Holden *v.* Stratton, 198 U. S., 202.)"

(g) Much light is thrown upon the question whether such life insurance policy proceeds are "income" or not, in the recent address of Prof. C. C. Plehn as president of the American Economic Association entitled—

> "*The Concept of Income, as Recurrent Consumable Receipts.*" (American Economic Review, March, 1924),

which deals particularly with "income" under "Income Tax Laws", and from which the following passages are excerpted:

> "*One of the essential characteristics of income is anticipated recurrence* * * * Income is essentially wealth available for recurrent consumption, *recurrently* (*or periodically*) *received.* Its three essential characteristics are: *receipt, recurrence, and expendability.* It is wealth looked at primarily from the point of view of time. Income is distinguished from capital, in that capital is thought of as *possessed;* not as being received; capital is regarded as *continuing* or enduring, *not as recurring;* as wearing out, but not as recurrently consumed or used to live on; and as something to be maintained in as enduring a form as possible * * * *That recurrence, more often expressed as regularity, is an essential feature of income, has been pointed out by many writers.* But most of them express it by saying that income is a "flow of wealth" a metaphor which involves serious logical difficulties, and overstresses the idea of regularity or continuity. As I use it here, recurrence does not necessarily imply regularity nor, of course, irregularity, but merely *periodicity* * * * By the term spendable, it may be well to explain, is meant that they may be used to live on without direct impairment of one's anticipated or expected future income. That is, spending may not interfere with recurrence * * * *Treasure trove, a gift of capital, an inheritance are all*

likewise spendable receipts. That is, they may be spent without impairment of anticipated future income from sources available before they are received. But of course it is not considered wise to spend these, unless they are small, but to treat them as continuing or as capital, using only the income therefrom for spending."

In line with this is the language of *Prof. Edwin R. A. Seligman* in an article in the American Economic Review, Vol. IX, No. 3, on "*Are Stock Dividends, Income?*", which was submitted by Judge Hughes and Mr. Geo. W. Murray as counsel for defendant in error in Eisner v. Macomber, 252 U. S., 189, but was in part criticized by Prof. Plehn in the passage just quoted. In it, he wrote:

"The second characteristic of *income* is that it denotes a *flow or succession, of such satisfactions expressed in money or money's worth, during a period of time.* If there is only a single utility or a unique service we speak of an *accession*, rather than of a *succession* of satisfactions. *But whether there be one or many, we think of their coming in during a period of time. The quality of periodicity is essential.* Thus income must be either annual, or monthly or daily income, or *income for some other period of time.* Income is spoken of as a result of the capital. In capital, value is a result of the income or income value * * * Income represents a flow or stream of utilities or money, and capital represents a fund or stock of utilities or money. *The flow or stream* is *periodic;* it represents a succession of utilities or money during a period of time. The fund or stock is the accumalation of such utilities or income at an instant

of time. Income is expressed in terms of a flow; capital in terms of a stock * * * The income is primary, the capital is secondary."

In several of the cases in this Court, quoted hereinbefore, the chief elements of "income" expounded by these distinguished economists, were emphasized, including, of course, the factor of the derivation of income "from capital, from labor or from both," and its contrast to "capital," and to some extent, the matter of *expected recurrent periodicity*. As the ordinary understanding as to the meaning of the term in 1913 is the test, the other factor emphasized by Prof. Plehn, as to probably intended "expendability" is also of importance, for proceeds of life insurance policies are not ordinarily regarded as spendable income, but, on the contrary, are analogous to gifts, bequests and treasure trove. As to *the element of "recurrent periodicity,"* which Prof. Plehn emphasizes, it is, of course, fatal to the theory that life insurance proceeds are "income," and the holding that "a gain from sale or conversion of capital assets" is income, even from isolated transactions, not in the line of one's particular business, is not inconsistent with this view (*Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S., 509 at 520). Recurrent periodical gain is sought in such a case, too, unlike the case of a life-insurance policy payable at death. Moreover, it is only by eliminating the factor of the human life involved, on which the whole policy turns, that one can even plausibly argue that the insurance money is the proceeds of the aggregate premiums, regarded as capital. The factor emphasized by this Court in Doyle v. Mitchell Bros. Co. *supra*, which also impressed Attorney General Gregory materially, the duty to restore "capital value,"—including the human life, as well as prem-

iums paid—must be met, before the proceeds of the policy, less dividends, can be regarded as "income." The argument as to the necessity of the element of recurrent periodicity in income, is moreover, further emphasized by other authorities under our Income Tax Laws. In

U. S. v. *Oregon Washington R. & Nav. Co.*, 251 F. R., 211 (C. C. A.)

Judge Learned Hand, writing, said in rejecting the theory that a six million dollar gift to a corporation by its sole stockholder, by way of release to it of an obligation, was taxable income:

> "However, the tax, though it includes income *'from all sources,'* nevertheless includes 'income' only, and *the meaning of that word is not to be found in its bare etymological derivation. Its meaning is rather to be gathered from the implicit assumptions of its use in common speech. The implied distinction, it seems to us, is between permanent sources of wealth and more or less periodic earnings.* Of course, the term is not limited to earnings from economic capital, *i. e.*, wealth industrially employed in permanent form. It includes the earnings from a calling, as well as interest, royalties, or dividends, though in the case of corporations this may be of slight importance. *Yet the word unquestionably imports, at least so it seems to us, the current distinction between what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another, and the power itself, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed.* Now, it seems to us hardly arguable that the cancellation of the debt in question was not in the category of capital. The corporation had just commenced its busi-

ness; the cancellation of the debt was a means of contribution to its capital account, quite as though the money had been contributed by the stockholder only to enhance the value of his stock. The financial relief, so given, will, it is true, be eventually reflected in the income, since the defendant will no longer be entitled under the act to deduct the interest on the debt; but that only brings out more clearly *its character as capital contribution.* We regard the difference as precisely equivalent to the difference between the cancellation of a portion of the mortgage bonds and a cancellation of an equal proportion of their coupons. Common usage would, if we are right, unfailingly allocate the first as an increase in capital assets and the second as an increase in income. That, as we view it, is the proper test of the act."

In *Gavit* v. *Irwin*, 275 F. R., 643,

Judge Cooper held a bequest of income for life until the testator's daughter became of age, not taxable income under the Income Tax Law of 1913, but capital bequeathed to such beneficiary.

The Court said:

> "If this is income, therefore, it is the income, not of the capital of the plaintiff, but of the capital of a portion of the Brady estate, which capital will never be that of the plaintiff. * * * This ('income arising or accruing from all sources') must, however, be held to mean moneys, which are essentially income, and which are income received from the labor or capital or both * * * of the person sought to be taxed, and to be limited by the provisions of subdivision B."

This decision was very recently affirmed by the U. S. Circuit Court of Appeals (Dec. 10, 1923; Federal Income Tax Service, 1923, pp. 869-877, not yet officially reported), in an opinion in which the Court pointed out that the provision of the Act of

1913 quoted above, making legacies and bequests non-taxable as income, unlike the income therefrom, is an

> *"exception, rather than an exemption,"*

language directly applicable to the section here involved also, and in itself meeting the Government's claim below herein, that "exemptions" are to be strictly construed, even apart from the claim that no "income" is involved at all. The Court concluded that, under the language of the Act of 1923,

> "what he (plaintiff beneficiary of income) receives, continues to be a legacy or bequest, and he is still a legatee."

> In *U. S.* v. *Merriam*, 282 F. R., 851 (affirmed by this Court in 263 U. S., 179),

the Circuit Court of Appeals said, as to the legacy given to an executor in lieu of commissions:

> "Everything that comes in is not income, taxable under the statute. * * * A legacy acquired by bequest does not proceed from labor."

(h) As an Income Tax is clearly here involved, even as regards the corporation sections, it is immaterial to consider whether Congress could have passed an excise tax, taxing corporations so heavily on the proceeds of insurance policies, regardless of the constitutional mandate applicable to direct taxes, and under a statute avowedly taxing income only, of both individuals and corporations.

POINT II.

The Revenue Law of 1918 does not authorize the taxation of the proceeds of life insurance policies payable to a corporation beneficiary, as "income."

(a) Nearly all of the arguments made under the prior point are applicable here also, as no "income" is involved, as that term is employed in the Act, and we have a long-established national policy against taxing life insurance policies as "income."

(b) *It is, however, stretching language unreasonably, to construe the provisions involved as authorizing such taxation as income in the case of corporation beneficiaries.* What was done was, simply, to insert an affirmative provision in Section 213, the provision of the Act dealing with individual incomes, exempting from such taxation

> "the proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured."

The express adoption of this section—covering all income embraced by the whole "Part I"—in Section 233, in the next Part, dealing with corporate income, cannot reasonably be construed as making such policies, when payable to corporations, taxable as income. If it had been intended to make such corporate receipts thus taxable—even assuming that they could have been made taxable as income—Congress would have expressly included such policies, just as modifications of the earlier "income" clauses are expressly set forth in the very next clauses of Section 233. *To transform an express adoption clause into an exception is, we submit, unreasonable, for the very purpose of an adopting clause is to establish the same rule for*

each class, in the absence of unmistakable language to the contrary (36 Cyc., 1152; *U. S.* v. *Cella,* 37 App. D. C., 423; *White* v. *Fuller,* 226 Mass., 145; *Farmers Bank* v. *Hale,* 59 N. Y., 53). Such overliteralness has been repeatedly condemned by the Courts.

> *U. S.* v. *Dominici,* 78 Fed. Rep., 334, 337 C. C. A.;
> See also *Holy Trinity Church V. U. S.,* 143 U. S., 457, 459-462.

As said by this Court at page 461 in the last-cited case, in quoting from an earlier decision of its own:

> "*All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence.* It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. *The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.* The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case

of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

It was well said on this point by the lower Court herein:

> "*It would be more logical to imply that as the act declared the proceeds of policies of life insurance was not income in the case of individuals, the same definition of income applied in the case of corporations, and as the act had defined what income was in one case, it was not necessary to define it in the other.* Especially is this true when it is remembered that the definition of 'gross income' is the same in both cases, and in construing the act with reference to the proceeds of insurance policies, whether individual or corporate, it would not be a strained construction to say that *as the definition of 'gross income' is the same in both cases, the item of proceeds of insurance policies excluded in the one case is also excluded in the other*—that *it is not in fact an exemption, but a definition of what is and what is not income within the meaning of the act*, and to clinch the matter the revenue act of 1921 makes no distinction between individual and corporation life insurance policies."

(c) The same result follows from the application of the elementary principle, that

> "*In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.* * * * We are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed."

The language just quoted, used by this Court, speaking by Mr. Justice McReynolds, in

Gould v. *Gould*, 245 U. S., 151,

holding that alimony is not subject to an income tax, was applied in the case of

U. S. v. *Coulby*, 251 F. R., 982, 985 (affirmed 258 F. R., 27),

as prevailing, as against the rule that exemptions from taxing acts should be strictly construed, which doctrine the Government involves herein also. See also *U. S.* v. *Field*, 255 U. S., 257, 262, 264.

(d) *The fact that Congress, in the present Revenue Act of 1921, omitted this alleged discrimination against corporate beneficiaries, after the question had been raised by the Commissioner's ruling, on the one hand, and the Attorney General's opinion as to exemption of accident insurance, on the other, is a legislative declaration that such insurance, payable to corporations, is not taxable income, and that the old established general policy against taxability was intended to be continued.*

U. S. v. *Coulby*, *supra* (at 985-6);
Bailey v. *Clark*, 21 Wall., 284;
Johnson v. *Southern Pacific Co.*, 196 U. S., 121;
Wetmore v. *Markoe*, 196 U. S., 68, 76-7;
U. S. v. *Field*, 255 U. S., 257, 264-5;
U. S. v. *Bhagat Sing Thind*, 261 U. S., 204, 215.

(e) *The decisions under the Income Tax Laws in*

Gould v. *Gould*, 245 U. S., 151 (Alimony) and

indicate the unwillingness of this Court to strain at taxability of alleged income in doubtful cases such as this, all three involving "peculiar" kinds of property.

(f) ***Moreover, life insurance proceeds are taxable under the Estate Tax provisions (subject to an exemption up to $40,000 where payable to third party beneficiaries), and this Revenue Act of 1918 also levied an excise tax on the taking out of all insurance policies at the rate of eight cents per $100 of insurance.*** (*Bankers & Mutual Ins. Ass.* v. *Walker*, 279 F. R., 53 C. C. A.) *The law discountenances the double or even multiple taxation that would result from taxing the same fund over again as income* (*Crocker* v. *Malley*, 219 U. S., 223, 233). In fact, it is interesting to observe that in the debate on the 1913 act in the Senate, one of the Senators in charge of the bill pointed out that a reason for excepting devises and bequests from the Income Tax provision was that they were to be reached by an Inheritance tax (Congressional Record, Vol. 50, p. 3839), and this same argument applies as to life insurance policies, when the latter were subsequently made taxable. Moreover, a discriminatory and inequitable result would be reached in taxing such life insurance policies, when the payees are corporations, and not taxing them in the cases of individual beneficiaries, especially when the former are cases where the payee pays the premiums, while the latter commonly involve gratuities. Serious questions as to the constitutionality of such a discriminatory course arise (*Gulf, Coronado & S. R. Co.* v. *Ellis*, 165 U. S., 150; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S., 1, 24-5).

(g) Particularly relevant on several of the questions here involved, is the decision of the Court in

Tyler v. *Treasurer*, 226 Mass., 306,

in which the Court declined to treat life insurance policies payable to third party beneficiaries as taxable, despite general language covering them. Said the Court:

> Rugg, C. J.—"The question raised in these cases is whether money paid to the beneficiary under a policy of life insurance is subject to the succession tax. The policies here in issue all are well recognized forms of genuine life insurance. Manifestly money so paid does not pass 'by will, or by the laws regulating intestate succession.' But it is contended in behalf of the Treasurer and Receiver General that it is comprehended within these words of St. 1912, c. 678, Sec. 1, as amended by St. 1913, c. 498: '*All property* within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the Commonwealth, * * * *which shall pass* * * * *by deed, grant or gift*, except in cases of a *bona fide* purchase for full consideration in money or money's worth, *made or intended to take effect in possession or enjoyment after the death of the grantor*, * * * *shall be subject to a tax*.' Confessedly the beneficiary of each of the insurance policies in the cases at bar receives nothing by way of 'deed' or 'grant.' Hence the only word of the statute which can be argued to be operative is 'gift.' A policy of life insurance is a contract. It is commonly a tripartite agreement, to which the parties are the insured, the insurer and the beneficiary. A policy of life insurance is a contract for a consideration paid, usually in money, in one sum or at different times during the continuance of the risk, which involves the payment of money or other thing of value by the insurer to the

family, kindred, representative, or other designated beneficiary of the holder of the policy, conditioned upon the continuance or cessation of human life, or which involves a guaranty, assurance or pledge of an endowment or an annuity. * * *

"The contract of life insurance differs from most other contracts, in that it is not intended ordinarily for the benefit of the insured, but of some dependent. Its original and fundamental conception is a provision by small, periodical contributions to secure a benefit for the family. While this conception has been enlarged in some respects, and especially in its commercial aspects, still the basic elements continue and are found in all the cases at bar. The insured retains no ownership of that which has passed to the beneficiary under the contract. A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last. Whatever the insured does in way of designation of a beneficiary takes effect forthwith. *If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary.* * * *

"The insured has not title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. *So far as the insured is a 'grantor,' to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift,' the only thing which he has to give is a right in a contract.* By designating a beneficiary, both the 'grant' and the 'gift,' so far as either exist at all, take effect in enjoyment and possession at once. *Such a relation does not by fair intendment come within the descrip-*

*tive words of the statute as 'property * * * which shall pass * * * by * * * gift * * * made or intended to take effect in possession or enjoyment after the death of the grantor.'*

*"Tax laws are not to be stretched beyond their reasonable meaning, but rather in cases of doubt are to be construed with some strictness. * * * If an alleged right to tax does not fall within the words of the governing statute, it does not exist. * * ** None of the policies in the cases at bar are commercial contracts which bear any *earmarks of being designed to avoid the operation of the tax law.* On the contrary, *they are well recognized forms of insurance which have been in common use for a long time. The conclusion is that sums received by beneficiaries in accordance with designations made in contracts of insurance are not subject to the succession tax. This conclusion is confirmed by the practical construction put upon the law by those charged with the enforcement of the law through many years, a circumstance sometimes entitled to considerable weight.* Burrage *v.* County of Bristol, 210 Mass., 299. *It is in harmony with the few other decisions which have come to our attention where this point is involved.* (Estate of Bullen, 143 Wis., 512, 523; Matter of Parsons, 117 App. Div. [N. Y.], 321; Vogel's Estate, 1 Penn. Co. Ct., 352.)"

Since then, *Matter of Voorhees*, 200 App. Div., 259, is similar; but, as seen, the Federal Estate Tax Act levies an inheritance tax on such policies in excess of \$40,000, in line with *Matter of Allis*, 174 Wis., 527, as the language was unmistakable.

In the lower Court, the characteristics of such life insurance policies as are here involved, upon the life of a dominating corporate official and payable to the corporation, were well expressed as follows, with respect to the theory that "income" within the Federal Income Tax is also involved:

"It cannot be said that the proceeds of life insurance policies come within the meaning of the above definition. It seems to us, that *in this case the contract of insurance was a contract to indemnify the plaintiff for the loss which it would incur by reason of the death of its president.* The plaintiff company *did not invest money with any expectation that it would receive a return from it. On the contrary, the money which it expended in paying the premiums on the policies might very well never have been returned to it*: the probabilities were that the money would not have been returned, because the person insured had a much greater expectation of life than five years, the term of the policy. *The money so paid out cannot be considered an investment from which the company could expect an income.*"

(h) The very serious question also presents itself, on the Government's assumption, as to when a life insuance policy becomes payable to a corporate "beneficiary," and whether taxability is supposed to be limited to the case of policies originally made so payable, or embraces the case of policies originally payable to individual beneficiaries, and assigned some time before maturity to corporations. In the former case, it would be a simple matter to take the policy out in the first instance in the name of an individual, and assign it to a corporation, and only the unwary would be mulcted by this heavy tax. In the other contingency, however, a most serious consequence to thousands of individuals and corporations would result from an unintended result of this tax law. The Court will doubtless take judicial notice of the fact that many millions of dollars are loaned to beneficiaries of life insurance policies on the security of assignments of their policies, that often policies expressly provide for loans

up to the surrender value, and at specified interest rates, to be made either by the insurance company or its subsidiaries, and that often third party lenders, commonly corporate, will pay further sums for an absolute assignment of the policy, after its surrender value is reached, and it can no longer be carried. Are all such lenders to be mulcted, and *ex post facto*, at that, by the amount of the tax? Are they to be thus unjustly taxed, even after the amount of the loan had been fixed, at the inception of the policy, at sums having no relation to such unanticipated heavy assessment? Moreover, individual beneficiaries are also deeply concerned, both as policy-holders interested in the corporation and, in addition, if such future sums cannot be secured upon their policies, except in as far as there may be a prior subsisting obligation to loan up to a certain sum on the part of certain companies. Such argument indicates the grave "injustice and unreasonableness" that would result from the Government's theory.

POINT III.

The judgment appealed from should be affirmed.

Respectfully submitted,

HENRY NECARSULMER,
MAX J. KOHLER,
Of Counsel,
as *Amici Curiae*.

March 31, 1924.